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IS THE LEGAL PROFESSION LOSING ITS INFLUENCE IN THE COMMUNITY?

We take little stock in the talk that we so often hear to the effect that the lawyers of this day do not occupy the position in the community which they held in the good old days of the heroic past, or that judges are not now honored in the same manner as they were in days gone by. Conditions affecting the practice of law have changed just as have conditions affecting almost every other social activity. It is true that in our day the shyster and pettifogger are the objects of public scorn, but so were they in the days of Uriah Heep, of Henry VIII, and of the ancient Roman Empire.

A very cursory reading of the history of the legal profession will force anyone to the conclusion that never before in the world's history were lawyers so much respected and trusted with the most important public and private duties as they are now. Never before in the history of the courts have the judges been so fully respected, and, withal, so worthy of respect. So rarely does a judge prove unfaithful to the trust reposed in him by the public that an instance of corruption or malfeasance on the part of even a petty judge is chronicled the country over as a nine days' wonder. Things were not always so. Where lawyers receive now only unkind words, in former days they received volleys of stones and decayed vegetables. The first idea of the followers of Jack Cade was to kill all the lawyers. In 1651, a bill was introduced into Parliament making all lawyers ineligible to that body on the theory that they were all scoundrels and public enemies. In 1780, upon the outbreak of the Gordon riots in London, the first point of the mob's attack was the Inns of Court where the lawyers were gathered. In view of such facts as these, how foolish it is to talk of the high position which lawyers once held in public estimation.

It is even more foolish to assume that in the great days of the past the judges were more honored than now. We occasionally impeach a judge, and there has, at times, been considerable clamor for the popular right to recall judges, or at least to recall their decisions. We have never mobbed our judges. Yet it is reported that King Alfred, who was the apostle of sweetness and light in his day, hanged forty-four judges in one year because he did not like their opinions. Lord Mansfield, the greatest creative intellect among all of the Anglo-American lawyers that have lived, was mobbed in the streets of London, and so was Lord Eldon, probably the greatest of the English Chancellors. Think of the speechless horror we should feel if anybody should even threaten personal violence against the Chief Justice of the Supreme Court of the United States.

How did the judges stand in popular opinion in the great days of our own past when the heroes of '76, the great lawyers that fashioned our immortal Constitution, were alive? How was it in the days of Pinckney and Randolph, Jay and Rutledge, of Luther Martin and Alexander Hamilton? The Supreme Court of Massachusetts could easily have made answer, for in 1786 a mob broke into the Supreme Court room at Springfield and the members of the court barely escaped with their lives by fleeing ignominiously out of the back door and thence to Boston.

Furthermore, the judges in the "good old days" weren't entitled to very much more respect than they actually received. For instance, in Cromwell's day an act of Parliament was passed making it a

penal offense to bribe a judge. We have abundant evidence that in those days the judges were guilty of practices that would be regarded as almost unthinkable on the part of judges in our time. Thus Sir John Trevor, in the latter part of the seventeenth century, was removed from his position as speaker of the House of Commons because he had accepted a bribe of one thousand guineas for the passage of a bill through Parliament, but he, nevertheless, continued for many years thereafter to hold the important judicial office of Master of the Rolls. No fewer than three of the Chancellors of England were removed from office because of dishonest practices.

With these facts in mind, let us have done with this talk about the decay of the legal profession, and the growing lack of respect for judges. There is nothing in it. In truth, the lawyers and judges are more honored and respected now than ever before, simply because they are doing their work better than ever before. I suspect it is true of lawyers, just as of every other class, that they receive about as much public respect as they are entitled to, and they are entitled only to so much as they win by the wise and efficient discharge of the function that they have assumed.

The comforting reflection that we are discharging our social function better than ever before should not cause us to rest content with such accomplishment as we have achieved. There is unquestionably much room for improvement in the administration of justice in the American states. No lawyer, with vision, can deny that in many respects our work could be done better than we are doing it at present. Perhaps the first respect in which we should seek improvement is in a better understanding of the social aspect of the lawyer's function. We are too prone to think of the lawyer's career from a purely individual point of view. We think of the individual lawyer's success in getting business, in winning cases in the courtroom, in receiving many and fat fees. But it is quite possible, and indeed it has not infrequently happened, that the individual lawyer has accomplished all these things and yet not been a successful lawyer from the social point of view. He may even have grown rich in the practice of law, and yet, all the while, been an enemy to society rather than a friend. A lawyer is really successful only to the extent to which he renders a real social service in actually aiding the efficient administration of justice. And in the long run, the returns which the lawyer receives measured in terms of the two things he desires, public esteem and financial reward, depend upon the value of his services to the public.

Not only a sense of duty, but sound policy as well requires the legal profession to do a good job. The shyster lawyers, just as the quack doctor, may for a time prey upon the weakness and folly of the more ignorant members of society, but the body politic will somehow eventually rid itself of such parasites, and meantime their ill gotten gains will poorly requite them for the public contempt in which they are justly held.

W. R. VANCE.

NOTES OF IMPORTANT DECISIONS.

JUVENILE COURTS AND THE CONVICTION OF CHILDREN.—The rule of the common law was that children were conclusively presumed to be incapable of committing any crime under the age of seven; between seven and fourteen there was a rebuttable presumption of incapacity to commit a crime; between fourteen and twenty-one there was a rebuttable presumption of capacity to commit crime. The question now arises whether the Juvenile Court Acts have changed these presumptions. The recent case of State v. Burnett et al., 102 S. E. 711, holds that they have. In

that case, where children under sixteen, who committed crimes or misdemeanors were to be regarded as delinquents, the Court held that children under such age are not to be indicted for crime, and therefore are conclusively presumed incapable of committing crime. In this case two children, both under ten years of age, were indicted for murder. On motion, however, the indictment was quashed and the children were remanded to the Juvenile Court. The state appealed. The Supreme Court of North Carolina, in sustaining the act of the trial court, declared that the Juvenile Court Act exempted children under the age of sixteen from prosecution as criminals, and that such children were to be treated as delinquent and not as criminals. The Court said:

"Statutes of this kind have been very generally upheld in the authoritative cases on the subject, and our own court has already expressed its approval of the general principles upon which they are made to rest (In re Watson, 157 N. C., 340; Lindsay v. Lindsay, 257 Ill., 328; Pugh v. Bowden, 54 Fla., 302; Hunt v. Wayne Co., Cir. Judges, 142 Mich., 93; Comm. v. Fisher, 213 Pa., 48; Ex parte Januszewski, 196 Fed., 123). To the objections frequently raised that these statutes ignore or unlawfully withhold the right to trial by jury, these and other authorities well make answer that such legislation deals and purports to deal with delinquent children not as criminals but as wards, and undertakes rather to give them the control and environment that may lead to their reformation and enable them to become law abiding and useful citizens, a support and not a hindrance to the Commonwealth."

In the case of In re Watson, 157 N. C. 340, the Court answered the objection with respect to the child's constitutional right to trial by jury by saying that proceedings under the Juvenile Court Act were not criminal, and that "such investigation is not one of which the constitutional guaranty of a right to trial by jury extends, nor does the restraint put upon the child amount to a deprivation of liberty within the meaning of the Declaration of Rights, nor is it a punishment for crime."

In ex parte Januszewski, 196 Fed. 123, speaking of the effect of the Juvenile Court Acts upon the responsibility for crime, the Courts said:

"At common law there is a conclusive presumption that a child under 7 years of age is incapable of committing crime, and the same presumption exists to the age of 14 years as to minor offenses. Between 7 and 14, and as to graver crimes, there was also a presumption against the ability to commit them, rebuttable, however, on clear and convincing proof that the child possessed the knowledge and discretion requisite for legal accountability. The statute in this respect only operates to extend the conclusive presumption, in all cases, to children under 14, and, as we have endeavored to show, is clearly within the legislative powers.

IS RIGHT OF TRIAL BY JURY TAKEN AWAY BY A LAW WHICH AUTHORIZES A NEW TRIAL ON QUESTION OF DAMAGES ALONE.—No one has stood more earnestly for the preservation of the Constitution than has the editor of this Journal. On the other hand we have contended that the Constitution is so broadly framed that, properly construed, it offers no serious impediment to progress. Our view is that the narrow construction of the Constitution in some early cases by the Supreme Court, which the present Court has, in most instances corrected, has been one of the reasons for the attacks upon the Constitution so common in the last few years.

An illustration of a rigid construction of the Constitution is found in the decision of the Circuit Court of Appeals (3rd Cir.) in the case of McKeon v. Central Stamping Co., 264 Fed. Rep. 385. The plaintiff secured a judgment for personal injuries. The trial court could find no error except in the assessment of damages and granted a new trial for the sole purpose of submitting to a new jury the question as to the amount of damages. In this the Federal District Court followed a New Jersey statute, providing that "when a new trial is ordered because the damages are excessive or inadequate, and for no other reason, the verdict shall be set aside only in respect of damages, and shall stand good in all other respects."

The Circuit Court of Appeals reversed the second judgment because the entire case should have been heard *de novo* by the jury. If the sole ground of the reversal had been that Sec. 914 of the Revised Statutes did not require the District Court to follow the state procedure in respect to new trials, we would have had nothing to say. That section has already been so emasculated by the federal courts that attorneys no longer put any reliance in it. But when the Court goes further and declares that even if it were proper for the District Court to follow the state statute with respect to new trials, it could not follow this particular statute because it was contrary to the Seventh Amendment, we feel some protest should be made to a construction of the Constitution at once so ridiculous and unprogressive.

The Seventh Amendment provides that "the right of trial by jury shall be preserved." The Court of Appeals, by its decision, seeks to

include in the term "trial by jury" all the rules of procedure by which the jury reaches a verdict, thus forever making it impossible not only to abolish the jury but to change the rules of procedure governing their action. On this point the Court said:

"Addressing ourselves, then, to the question of what was this trial by jury as then fixed by the common law of Great Britain, it will be seen that the jury of the common law of England, consisted of 12 men, that it heard all the evidence pertinent to the issue raised by the pleadings, it returned a single verdict, and upon such verdict judgment was entered, and if a new trial is granted it is a trial of the whole case."

The Constitution preserves the institution of the jury, not the procedure by which it does its work. The jury is a body of twelve disinterested men to find the truth (*vere dictum*) concerning certain facts submitted to them. That is all that is guaranteed by the Constitution. The procedure by which the jury reached such facts has changed from age to age, but the institution itself has remained and it would destroy the effectiveness of this great institution if the Court should hold that the exact procedure in force in 1775 or 1789 (it is hard to tell which date the Court holds to be standard) by which a jury in England reached its results is also preserved inviolate.

It is interesting to note that all students of the jury agree on the facts that the distinctive feature of jury trial is the ascertainment of facts. Mr. Chamberlayne, in his new work on Evidence (Vol. I, p. 367), after thoroughly reviewing the history of the jury from the earliest times declares that "the special function of the jury, according to the established usages of the English law, is limited to the ascertainment of what is the truth as to a particular proposition of fact which the parties, through the operation of a preliminary branch of procedure, called pleading, have seen fit to submit to their decision." Prof. Thayer, in his Preliminary Treatise on Evidence, shows that the jury in its present significance is a comparatively modern institution. Up to the time of the Tudors it was a body of witnesses who decided the case on their own knowledge. He also shows that special verdicts were common. "The Knights may either say directly and shortly that one party or the other has greater right, or merely set forth the facts and thus enable the justices to say it—what we call a special verdict." Thayer Prel. Treat. 63. There was also required of common-law jurymen a property qualification. Fortescue De Landibus Legum Angliae, Secs. 25 and 26 (Amos Tr.). Is this requirement preserved in our Constitution?

We think it is clear that to preserve the right of trial by jury the framers of the Constitution did not preserve the rules governing the selection, the right of challenge, the qualifications imposed, the methods of introducing the evidence, the manner of reaching a verdict—all this was mere matter of procedure, much of which was, even at the time the Constitution was written, in process of changing. It was the jury itself—the body of twelve men selected from the community—who were to determine facts submitted to them by the Court under the pleadings. It is not an enforcement of the right of trial by jury, but rather an effort to increase its effectiveness, to provide that on retrial only such issues shall be determined which the Court finds to have been erroneously decided on the first trial.

RIGHT OF CLIENT TO DISCHARGE HIS ATTORNEY WITHOUT BEING LIABLE FOR DAMAGES.—Attorneys are often misled on the point of the inviolability of contracts with clients That in such a contract of employment there is always an implied condition that the client may discharge the attorney and terminate the contract at will without cause, is made clear by the recent case of Lawler v. Dunn, 176 N. W. 989.

In this case the plaintiff, an attorney of St. Paul, contracted with defendant to defend him in a criminal suit, stipulating that he should receive $3,000 for trying the case before a jury, and a reasonable value for his services in presenting and arguing the case on appeal, if necessary. The case was lost in the trial court and defendant discharged his attorney and hired another. At the time of the discharge plaintiff had simply filed a motion for a new trial and an arrest of judgment, as a preliminary to an appeal. He demands full value for services rendered and damages for breach of contract. The Supreme Court of Minnesota, holding that the attorney was not entitled to damages for breach of contract of employment, said:

"The right of a client to discharge his attorney at his election, with or without cause, is universally recognized by the authorities (Thornton on Attorneys at Law, sec. 143; Crosby v. Hatch, 155 Iowa, 312, 135 N. W., 1079; Gage v. Atwater, 136 Cal., 170, 68 Pac., 581; In re Paschal, 10 Wall., 483). If the client has the right to terminate the relation of attorney and client at any time without cause, then the contract differs from an ordinary contract of employment in that one of the parties

thereto may put an end to the same, whether agreeable to the other party or not. If the client has this right as an implied condition of the contract under the law, it follows as a natural consequence that he cannot be compelled to pay damages for exercising that right which his contract gives him."

This decision is clearly in line with both reason and authority. The reason for the rule is well stated in the leading case of Martin v. Camp, 219 N. Y. 170, where the Court said:

"If in such a case the client can be compelled to pay damages to his attorney for the breach of the contract, the contract under which a client employs an attorney would not differ from the ordinary contract of employment. In such a case the attorney may recover the reasonable value of the services which he has rendered, but he cannot recover for damages for the breach of contract. The discharge of the attorney by his client does not constitute a breach of the contract, because it is a term of such contract, implied from the peculiar relationship which the contract calls into existence, that the client may terminate the contract at any time with or without cause. And it follows from this rule, by necessary implication, that if the client has the right to terminate the contract, he cannot be made liable in damages for doing that which under the contract he has a right to do."

THE POSITION OF MONEY PAID AS A DEPOSIT.

Contracts of sale, particularly those for the sale of land, usually contain express provisions guarding against the contract going off and authorizing the vendor to retain the deposit in the event of the purchaser not carrying out his bargain. With such contracts the difficulties which emerge on failure to perform the contract are reduced considerably as compared with those numerous informal contracts in which the only provisions regarding the deposit are those which just barely state that a deposit of such and such an amount has been made. What then are the purchasers' and vendors' rights respectively when a deposit has been paid and all chance of carrying the contract through to completion is at an end.

The case of Howe v. Smith[1] has been often cited as an authority for the broad proposition that if a purchaser pays a vendor a sum of money by way of deposit, the latter is entitled to retain it in the event of the purchaser's default in carrying out the contract to completion. Having had occasion recently to look more closely into the question, we think it well to set out here the exact ground of decision in that case. The facts briefly were, that the purchaser (plaintiff) claimed specific performance or a return of the deposit, and he was eventually held to be entitled to neither. The contract for sale contained a clause in common form to the effect that a sum of money "had been paid on the signing of this agreement as a deposit and in part payment of the purchase money." The three judges of the Court of Appeal were unanimous in arriving at the result stated, and we think the ground for their opinion is found in one of the earlier cases quoted in their judgments,[2] which laid down the principle that "in the absence of any specific provision the question whether a deposit is forfeited depends on the intent of the parties to be collected from the whole instrument." The opinions delivered deal at length with the nature and implications of "a deposit" and those of some of the judges likening it to "earnest" which is lost by a party who fails to perform his part of a contract, and probably gave rise to the unqualifiedly general view of the case to which we have made reference.

A comparatively recent case in the Scottish Courts illustrates further the importance of the question, what "a deposit" really is.[3] In the contract for the sale of a ship it was provided that in the event of failure in the due payment of the purchase money of £30,000 by the purchasers a deposit of £3,000 made by the purchasers "shall be forfeited to the sole use of the vendors and any deficiency on a resale between the amount realized and the amount

(1) 1884, 50 L. T. R. 573.

(2) Valmer v. Temple, 1833, 9 A. & E. 508.

(3) Robert & Cooper Ld. v. Salvesen & Co. & ors., 1918, 55 S. L. R. 721.

due under the contract shall be borne by the purchasers together with interest and all expenses of such resale." The purchasers refused to implement the contract and sued to recover the sum deposited, alleging, as was the case, that the vendors had made a large profit on the resale of the ship. It was held that according to the intention of the contract the deposit was a security for implement which the purchasers could not, by taking advantage of their own breach, recover.

Dealing with the case of Howe v. Smith[4] the Lord President observed that it appeared to be on all fours with the case before him and expressly approved of the ground judgment there stated by Lord Justice Cotton that "if the sale goes on, of course, not only in accordance with the words of the contract, but in accordance with the intention of the parties in making the contract, the deposit goes in part payment of the purchase money, but if on the default of the purchaser the contract goes off, that is to say if he repudiates the contract, then he can have no right to recover the deposit." And referring to an argument based on the dicta in Howe v. Smith as to a deposit being an earnest, the learned Lord President rejected that theory and gave emphatic approval to the following characteristic passage from the judgment of Lord Justice Bowen: "We have therefore to consider what in ordinary parlance and as used in an ordinary contract of sale is the meaning which business persons would attach to the word 'deposit.' Without going at length into the history or accepting all that has been said or will be said by other members of the court on that point it comes shortly to this that a deposit, if nothing more is said about it, is according to the ordinary interpretation of business men as security for the completion of the purchase. But in what sense is it a security for the completion of the purchase. It is quite certain that the purchaser cannot insist on abandoning his contract and yet recover the deposit, because that would be to enable him to take advantage of his own wrong."

A case apparently differing from those above cited but really agreeing with them, as to the ground of judgment—intention of the contracting parties—was lately decided in the Canadian Courts.[5] There the defendant had sold to the plaintiff a quantity of scrap iron by written contract under which sixty dollars had been "deposited" on the contract when it was signed and the purchaser had to pay "forty dollars on contract" before loading. Both sums were paid, but the purchaser failed to carry out the rest of his agreement and the vendor resold the goods. The purchaser then sued for a return of the one hundred dollars. The trial judge found in favor of the defendant, but this was reversed in the Appellate Division and the plaintiff held entitled to recover his deposit and installment, and referring particularly to the case of Howe v. Smith, the Chief Justice observed: "In that case it was treated as one of contract, one of fact, whether the purchaser had agreed that the seller should retain the payment made if the plaintiff failed to carry out the contract." And with reference to the word "deposit" it was said "that word could have no technical meaning in the minds of these unlettered men; neither party intended a forfeiture—that is put beyond question in the testimony of each."

But the law is thus, we submit, not open to much doubt. The governing consideration as to the recovery of a deposit is the intention of the contracting parties. It is, therefore, but common prudence for them or their advisers or agents to see that intention is ascertained and defined, such definition being made in writing and embodied in the contract itself.

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(4) Supra.

(5) Brown v. Walsh, 1919, 45 Out. L. R. 646.

THE LAW'S DELAYS IN APPELLATE PROCEDURE.

The article of Mr. W. M. Cain, in the CENTRAL LAW JOURNAL of May 7, 1920, concerning the Law's Delays and Some Proposed Remedies, is both interesting and instructive.

It may be said, roughly speaking, that there are two means of delay in every law suit, the Legislative Delay and the Judicial Delay.

Through legislation, whether constitutional or statutory, the person seeking judicial action, for the enforcement of a right, or for the redress of a wrong, may expect, in the ordinary course of this legislative delay, before final determination, a lapse of time that may and does often extend into months and even years.

Through legislative procedure there has been provided generally, in the various states, a system of Courts, from the lowest, or Justice's Court, to the highest appellate, or Supreme Court, and a system of procedure administrative thereto, to which the litigant, for general purposes, may resort before there is a final determination of his rights. This prescriptive length of time may neither be lengthened nor shortened so far as the legislative acts themselves are concerned.

The delays occasioned through the use of this legislative system, both as to the number of Courts involved and the administrative procedure made applicable thereto, and the grievances that arise thereunder, are matters addressed to the legislative branch and are chargeable to the prescriptive legislative action.

On the other hand, judicial delay concerns that delay which occurs either in the Court's administration of the legislative procedure provided, or in the Courts procedural rules, as adopted and administered.

Judicial delay in this procedure, whether statutory or Court, which does not promptly, consistent with efficiency, expedite litigation is delay worthy of the serious consideration of the Bench and the Bar.

The complaints concerning these delays of the law in litigated cases have been long standing. These complaints have been made, not only by the public, but by both the Bench and the Bar. Through public attention and criticism and through the cooperation of the Bench and the Bar in connection with legislative action, there has been evidenced a serious purpose, for several years past, to lessen the delay both in federal and state Court procedure.

To a certain extent, perhaps, the public, in attempting to avoid error and to better secure the rendition of impartial justice, has not only increased the number of Courts, but the legislative procedural rules through which a suitor at law may try or review, again and again, the law and the facts of his legal grievance. Procedure, accordingly, has generally been prescribed which is not summary or discretional with the Court, but routine and formal. Often this procedure, so prescribed and possible to be invoked, is of itself, a discouraging factor to the litigant where the element of time is of the essence of the right sought to be enforced.

So, in following this procedure, the complaints are presented and urged that the dilatory tactics of the lawyer, and the slow and tardy steps of the Courts bring too often into actual realization, the maxim, that "justice delayed is justice denied."

To the extent that this judicial delay is responsible for these complaints, justly presented, the Bench and the Bar must bear the responsibility and must measure up to the needs and the action required to remove them.

In trial work this judicial delay, in excess of the legislative prescriptive delay, is often evidenced as follows:

The time required, through the tardy or dilatory action of attorneys, in bringing a cause at issue, and upon a trial calendar: the time required to secure a hearing and

to reach a judicial determination, through the dilatory or perfunctory action of both the Court and the attorneys; the time required, after trial, to prepare, present and settle the record, for purposes of a new trial or review, or upon appeal, through the same dilatory or perfunctory action of both the Court and the attorneys. Often the time so taken has measured into years.

In appellate procedure, this judicial delay, even beyond the legislative prescriptive delay, has been frequently also evidenced as follows: The time required for the preparation of briefs by attorneys through their tardy action; the time required for an opportunity to have the cause placed upon the appellate calendar and to be heard; after final argument, the time required, through procedural rules or tardy action of the Court, before the cause so argued is actually considered in conference, before the law and the facts therein are actually investigated by the Court, or a particular member thereof, and, before the final conference and final opinion of the Court. The time, thus taken, often again has measured into years.

Concerning these judicial delays the complaints have often been presented and urged, that litigation is thus made prolonged, and justice often denied; that an opportunity is thereby presented to one, financially strong, to exhaust and wear out his contestant, less strong; that, furthermore, upon the principle that time assuages grief, the Bench and Bar, after undue delay become slothful, indifferent and inconsiderate upon the law and the equities of the cause. That the Bar, eager for their clients' cause, often avail of this time element to aid their cause. That otherwise attorneys whose wits were sharpened by a strenuous battle in the trial Court, through this time delay, become rather dull and even indifferent in consideration of the cause upon appeal.

These complaints, whether justly or unjustly founded, have nevertheless been applied to both the Bench and the Bar concerning the effect of the law's delays.

It may not be doubted that it is the aim, purpose, and ideal of the Bench and the Bar to attain the administration of justice with dispatch and efficiency.

It may not be doubted, again, that it is the desire of the people to be governed and guided, not by a rule of men, but by a rule of law and justice, interpreted and applied, when necessary, promptly and efficiently through the Bench and the Bar.

The means and methods of better accomplishment in this regard, procedurally, are the problems and responsibilities of the Bench and the Bar.

To their judgment, without legislative action, the people, when confident, will accede. To them, the people, when assured, will permit, without legislative action, the consideration and determination of these problems and responsibilities. For such consideration, the experiences here and there, of the Bench and the Bar, that have actually served to lessen this judicial delay, may serve useful purposes.

Mr. Cain, in his article, adverts to this judicial delay, made undue, through the number of Courts, appellate or otherwise, the number of judges, and the time taken in the expedition and determination of causes, both in trial and appellate Courts. In the course of appellate procedure he has made actual observations of the experience of some fourteen states concerning the time required in the judicial consideration of causes upon appeal. This time in various states, extends from a few months into years.

It is the purpose of this article to consider what has been accomplished in North Dakota in actually lessening this judicial delay in the appellate procedure alone, by the co-operation of both the Bench and the Bar.

In North Dakota there exists one appellate Court, the Supreme Court, consisting

of five judges, to which appeals from and through district and county Courts of increased jurisdiction may be had.

Through legislative enactments, the procedure upon appeal has been prescribed. Statutory provisions fix the time within which an appeal may be had; when the record may be filed with the Supreme Court; the time within which briefs are required to be filed, after the record has been sent up to the appellate Court; and the time for holding the terms of Court. These statutory provisions were supplemented by practice and procedural rules of the Supreme Court upon appeal.

Under a legislative act, which became effective July 1, 1919, the Supreme Court was granted additional powers to formulate and prescribe rules of procedure and practice covering both trial and appellate Courts. This has given to the Supreme Court an opportunity to lessen the legislative delay, theretofore prescribed by statutory rules, wherever by rule of Court it is apparent upon appeal that the course of a litigated case may be expedited in its hearing and determination. Formerly in this state under the legislative delay existing through statutory provisions, and the judicial delay mentioned above, it was commonly the practice upon appeal, to follow somewhat the following course of proceeding: After an appeal was perfected from the decision of the trial Court and the record filed with the Supreme Court, each of the parties then had his statutory time for the preparation and filing of briefs. This time by stipulation of the parties frequently was extended; thereafter, when the case upon appeal became ready for hearing it then had to await one of the statutory terms of Court, as well as possibly an opportunity to be heard at such statutory term, by reason of the number of cases on such calendar. Furthermore, by stipulation of the parties, the cause might be postponed from one calendar of the Court to another, until finally it was reached upon some calendar of the Court when the parties were ready. After the hearing and submission of the cause, or the decision of the Supreme Court, the practice that then existed involved a conference of the Court at some future date, and the assignment of such cause to some member of the Court for full and detailed investigation both as to the law and the facts applicable. Thereupon, the member of the Court to whom it was assigned made investigation and prepared an opinion upon the facts and the law, either tentative or final, as the case might be, for presentation to the Court upon conference. Conferences were held at irregular times and at times when it was deemed that causes might be determined by agreement of the members of the Court. Upon such conferences, when held, the opinion as prepared, if satisfactory to the entire membership of the Court, then might become the decision of the Court; if, otherwise, any member of the Court did not agree with such opinion, either upon the facts or the law, as stated, the decision of the cause became then postponed again until there could be a final agreement or dissent by the entire membership of the Court. Necessarily, this procedure in the presentation of causes upon appeal, and in their determination by the Court might involve and has involved judicial delay extending over periods of months and even years.

Commencing in January, 1919, and up to the present time, rules of the Supreme Court, from time to time, have been adopted and these, in connection with the later additional authority granted to the Supreme Court, pursuant to legislative act, have made a substantial change in the method of presenting, hearing and determining causes upon appeals before this Supreme Court. Before the commencement of these changes, records upon appeal before this Court were awaiting briefs of the counsel; many causes ready for hearing were awaiting the calendar of the Court and the Bar, not knowing when their respective cases might be reached for argument upon the calendar,

were resting assured that, if a cause was reached when they would be unable, by reason of other business engagements, or for other causes, to then present the same, by stipulation, it might be continued to await their convenience.

Under the rules now existing, the appellant must file and serve his brief at the time of filing the record on appeal. Under statutory rule, the respondent can compel the filing of the record within a brief statutory time. The respondent is required to file his brief in reply within fifteen days after it is served upon him.

Printed abstracts of the evidence, and of the record, and printed briefs, are not required; the typewritten reports of the official trial reporter, duly settled, and of the record, are sufficient. Likewise, typewritten briefs are received. Statutory terms of Court thertofore existing have been changed. Cases are now heard and determined under these rules, practically as soon as they are ready. It may thus happen that within a month two different terms or sittings of the Court may be held. Upon argument, full opportunity is given, if additional authorities and citations are desired to be filed to so do expeditiously within a short period, such as within three to five days. Under these rules, each member of the Court knows, before the hearing of a particular cause, to what member of the Court the investigation of the facts and the law falls. Anterior to the hearing of causes, therefore, each member of the Court has opportunity, in accordance with the assignments which may fall to him, to fully read the entire record and consider the briefs of the parties. This gives an opportunity to the Court to more clearly ascertain the facts of the record and the law applicable thereto, and to the parties, an opportunity upon oral argument, to clearly bring out the facts and discuss the law applicable, and in less time. Under these rules, furthermore, most of which have been proposed by Justice Grace, and unanimously adopted by this Court, conferences by the members of this Court are held two days of each week for the consideration of pending causes that have been argued or submitted. At these conferences, whenever an opinion is presented by a member of the Court upon a case argued and submitted, which after consideration is adopted by the majority of the Court, such opinion is thereupon filed under a so termed ten-days' rule. During this time, any member of the Court may further investigate and concur or disagree with such opinion. If such member especially concurs or dissents, his opinion may be considered in conference and the opinion as filed may be withdrawn by the writer or by the Court for further consideration. At the expiration of the ten days, the opinion filed becomes the final opinion and decision of the Court.

Furthermore, under the rule now existing causes that are ready for hearing and final submission may not be postponed by stipulation of the parties and may not be continued excepting for a period of a few days to convenience counsel, unless the most urgent reasons therefore, so determined by the Court, in conference, are made to appear.

It is interesting to observe how the judicial delay, hereinbefore discussed, has been actually shortened in appellate procedure by the recent course of procedure outlined, in connection with the active attempt of both the Bar and the Bench through work and co-operation, to expedite the hearing and determination of causes upon appeal. For a period of approximately six months the Supreme Court of this state has been entirely up with its calendar. This is termed a novel situation in the history of appellate procedure in this state. The Court has given opportunity to parties to submit by consent, causes that have just been appealed and in which the records have just been filed. It has urged counsel to assist the Court wherever possible in expediting this appellate procedure.

For instance, in Swift v. County Commissioners of Sioux County, involving an

involved question of law and fact, upon the right of the Trust Patent Indians to vote in this state, the record and appellants' briefs were filed in this Court on May 6, 1920; the respondents' briefs were filed on May 13, 1920. An extended oral argument was held on May 17, 1920. On May 25, the opinion of the Court was filed under the ten days' rule. On May 26, 1920, this opinion, signed by the entire membership of the Court, became the final opinion of the Court.

For purposes of illustrating by concrete compilations, the actual shortening of this judicial delay, a group of representative cases have been selected covering four different periods of time.

These have been considered for purposes of illustrating this judicial delay from the following viewpoints:

1. The time of delay between the filing of the record and the final disposition of the case.

2. The time of delay between the time when the case was at issue with briefs ready and the actual hearing by the Court.

3. The time of delay between the actual hearing of the cause and its final determination by the Supreme Court.

(1) *Time of Delay Between the Filing of Record and Final Determination.*

Under Old Procedure:

In December, 1917, average time of delay, 12 months, 9 days.

In December, 1918, average time of delay, 8 months, 12 days.

Under New Procedure:

In December, 1919, average time of delay, 3 months, 12 days.

In March, 1920, average time of delay, 1 month, 21 days.

(2) *Time of Delay Between the Time When Cause Was at Issue and Its Actual Hearing Before the Court.*

Under Old Procedure:

In December, 1917, average time of delay, 2 months, 3 days.

In December, 1918, average time of delay, 3 months, 7 days.

Under New Procedure:

In December, 1919, average time of delay, 5½ days.

In March, 1920, average time of delay, 8½ days.

(3) *Time of Delay Between the Hearing of the Cause and Its Final Determination.*

Under Old Procedure:

In December, 1917, average time of delay, 3 months, 19 days.

In December, 1918, average time of delay, 2 months, 10 days.

Under New Procedure:

In December, 1919, average time of delay, 1 month, 21 days.

In March, 1920, average time of delay, 17 days.

The above compilations include twenty days, the period allowed for filing petitions, for re-hearing, and the time taken by the Court for the disposition of such petitions. In 1919 the Supreme Court considered and determined about 275 cases, including original actions. It is readily observed that there has been an actual reduction of judicial delay under the new procedure, whether the matter be viewed from the delay occasioned by attorneys in bringing a record on appeal at issue, the delay of the Court in bringing the same on for argument or the delay of the Court in actual disposing of the cause after argument.

The practical results thus far observed, in addition to the actual lessening of judicial delay on appeal, are that the Bar is presenting promptly and more efficiently, as we think, their causes. There is less tendency now to invoke appellate procedure for reasons of any delay that might be occasioned thereby. The Court is entirely up with its calendar; it is better able to consider more intelligently and with prompter dispatch causes on appeal as soon as they are ready.

At least it is shown, that, where legislative authority is granted to the Courts to lessen through its procedural rules the law's delay, it is possible, through the cooperation of the Bench and the Bar to make effectual reductions in the time necessary to expedite and determine causes upon appeal.

H. A. BRONSON.

Bismarck, N. D.

HUSBAND AND WIFE—TORT ACTION BETWEEN.

DRAKE v. DRAKE.

Supreme Court of Minnesota. April 30, 1920.

177 N. W. 624.

(Syllabus by the Court.)

The husband cannot maintain against his wife an action in equity to restrain and enjoin the commission of acts towards him which amount to nothing more than a tort or series of torts.

BROWN, C. J. The parties to this action are husband and wife, though they have not lived together as such since November, 1918; plaintiff having separated from defendant because, as he claims, of her abusive conduct toward him. Her conduct in that respect, according to the allegations of the complaint, has been so oppressive, persistent and long continued as to become injurious to plaintiff's health and comfort, and he seeks by this action to have her restrained by injunction from further acts and conduct of the kind.

The complaint alleges that since the year 1916 defendant has carried on a systematic campaign against plaintiff of cruel and inhuman treatment, by annoying and otherwise making life miserable for him; that she goes to his office and there in the presence of others charges him with being an immoral man, and heaps upon him all sorts of abuse by false and untrue accusations; that she has attempted to drive him into bankruptcy, and has practically ruined his health; that by false and untrue charges she has caused societies to which he belonged to cancel his membership therein; that when she meets him on the public streets she creates a scene by calling to him in a loud voice to attract the attention of passersby, causing plaintiff great annoyance and embarrassment; that she creates like scenes in the church to which plaintiff belongs; that on August 29, 1919, she employed private detectives to waylay and beat him up, which would have resulted seriously had not third persons interfered for his protection; and, finally, that unless restrained defendant will continue like acts of misconduct to the annoyance, chagrin and irreparable injury of plaintiff.

A general demurrer was interposed to the complaint, which was sustained, and plaintiff appealed. The single question presented is whether under our statutes the husband may maintain a suit in equity against the wife to restrain conduct of the character stated and charged in the complaint. We answer it in the negative.

The allegations of the complaint, somewhat indefinite in several respects, taken as a whole, charge acts of misconduct on the part of defendant amounting to what is commonly known and understood as nagging, constituting in law nothing more than a series of personal torts, involving neither a breach of contract nor specific property right. The action then sounds in tort, and that it cannot be maintained seems settled by the decision in Strom v. Strom, 98 Minn. 427, 107 N. W. 1047, 6 L. R. A. (N. S.) 191, 116 Am. St. Rep. 387. That was a similar action, one for an alleged assault and battery committed by the husband on the wife, and was brought by the wife, and not by the husband, as in the case at bar. The Court in disposing of the case recognized and referred to the common-law disability of either spouse to maintain such an action against the other, and held that in the enactment of the so-called Married Woman's Act (G. S. 1913, § 7142), by which many of the common-law disabilities of the wife were removed, and she was placed upon an equality with the husband in respect to the management and control of her separate property, the Legislature did not intend to abrogate the rule of the common law on the subject, by extending to the wife a right of action for a tort committed against her by the husband during coverture. In other words, that the rights and privileges granted by the statute had reference solely to the management, control and protection of her property rights. The rule applies equally to the husband; the statute vested in him no other or greater right than that which was thereby conferred upon the wife. No property is involved in this action, and in the Strom case a claim for damages for an assault and battery was held not a property right within the intent and purpose of the statute.

The authorities in other jurisdictions are not in harmony, though the statutory provisions upon the subject appear substantially the same in all. A majority in number of adjudicated cases apply the rule followed in this state. Thompson v. Thompson, 218 U. S. 611, 31 Sup. Ct. 111, 54 L. Ed. 1180, 30 L. R. A. (N. S.) 1153, 21 Ann. Cas. 921;

there was a dissenting opinion in that case by Mr. Justice Harlan, concurred in by two of his associates. Bandfield v. Bandfield, 117 Mich. 80, 75 N. W. 287, 40 L. R. A. 757, 72 Am. St. Rep. 550; Schultz v. Christopher, 65 Wash. 496, 118 Pac. 629, 38 L. R. A. (N. S.) 780; 13 Ruling Case Law, 1395. The case of Peters v. Peters, 156 Cal. 32, 103 Pac. 219, 23 L. R. A. (N. S.) 699, was similar to that at bar, being one by the husband against the wife for assault and battery, and the California Supreme Court, construing a statute substationally like that of this state, held that it could not be maintained. The contrary was held in Brown v. Brown, 88 Conn. 42, 89 Atl. 889, 52 L. R. A. (N. S.) 185, Ann. Cas. 1915D, 70, and Fiedler v. Fiedler, 42 Okl. 124, 140 Pac. 1022, 52 L. R. A. (N. S.) 189, though the statutes of those states for all practical purposes are the same as in the states where the right of action is denied.

We prefer the rule of the Strom case, and think it should be adhered to until such time as the Legislature shall deem it wise and prudent to open up a field for marring or disturbing the tranquility of family relations, heretofore withheld as to actions of this kind, by dragging into court for judicial investigation at the suit of a peevish, fault-finding husband, or at the suit of the nagging, ill-tempered wife, matters of no serious moment, which if permitted to slumber in the home closet would silently be forgiven or forgotten. If that source of litigation is to be opened up at all, it should come about by legislation. Neither husband nor wife is without an appropriate remedy in such matters, where of a character to be redressed by the courts. The divorce courts are open to them, when the facts will justify relief of that character, and when the misconduct complained of is of a nature to constitute a crime the criminal laws will furnish adequate protection. But the welfare of the home, the abiding place of domestic love and affection, the maintenance of which in all its sacredness, undisturbed by a public exposure of trivial family disagreements, is so essential to society, demands and requires that no new grounds for its disturbance or disruption by judicial proceedings be ingrafted on the law by rule of court not sanctioned or made necessary by express legislation.

Order affirmed.

NOTE.—*Action for Tort by One Spouse Against the Other.*—In Thompson v. Thompson, 218 U. S. 611, 54 L. Ed. 1180, 31 Sup. Ct. 111, 30 L. R. A. (N. S.) 1153, the majority, 6 to 3, held that the married woman's act of the District of Columbia though giving married women the right "to sue separately for the recovery, security or protection of their property and for torts committed against them, as fully and freely as if they were unmarried" was not intended to give to a married woman "a right of action as against her husband, but to allow the wife, in her own name, to maintain action of tort, which, at common law, must be brought in the joint names of herself and husband," Justice Day, speaking for the majority, thought that divorce laws sufficiently opened the doors of the courts to accusations of all sorts by one spouse against the other. Whether this would be a sufficient answer in a state prohibiting divorce altogether or in a state where only the ground of adultery may be urged, is submitted. Justice Harlan took strong ground in a dissenting opinion, concurred in by Justices Holmes and Hughes, and he referred to torts not on the person of the wife but as affecting her property, and said "Congress is put in the anomalous position of allowing a married woman to sue her husband separately, in tort, for the recovery of her property, but denying her the right and privilege to sue him separately, in tort, for damages arising from his brutal assaults upon her person."

In Brown v. Brown, 88 Conn. 42, 89 Atl. 889, 52 L. R. A. (N. S.) 185, the Court held, that the married woman's act giving to a woman right to own property and transact business in her own name "is in the nature of fundamental legislation and involves all the results necessarily flowing from the principle established," destroying root and branch the common law unity between husband and wife.

Referring to a prior case in which the Court "held that a wife's right to contract with the husband and to sue him for breach of such contract followed necessarily from the fact established by statute, that her legal identity was not lost by her coverture. It is an equally necessary consequence of her retention of her legal identity after coverture, that she has a right of action against her husband for a tort committed by him against her and resulting in her injury, such a tort gives rise to a claim for damages. Such a claim is property not in her possession, but which she may by action reduce into her possession. * * The husband's delict, whether a breach of contract or personal injury, gives her a cause of action. * * * In the fact that the wife has a cause of action against her husband for wrongful injuries to her person or property, committed by him, we see nothing injurious to the public or against the public good or against good morals." It is then said either has the right to sue the other for a tort.

In Fiedler v. Fiedler, 42 Okla. 124, 140 Pac. 1022, 52 L. R. A. (N. S.) 189, the same conclusion as in Brown v. Brown is reached, and the opinion of Justice Harlan in the Thompson case in saying: "We are impelled to say that the philosophy of this great jurist appeals to us with more force and soundness, and impresses us as more in harmony with modern legislative intent on this question, than do the reasonings of

courts which hold the contrary. We think a clearly intended right would be denied to a married woman in such cases to hold that she could not recover.

In Sykes v. Speer, Tex. Civ. App. 112 S. W. 422, it is said: "It would seem to the writer that if a husband can be held responsible criminally for an unjustifiable assault upon one whom the law has placed under his care and protection, and who has for his sake surrendered so many of her civil rights and given up the legal status which she might otherwise sustain, certainly the same considerations of policy would permit her to recover compensation for damages which his brutality may have inflicted upon her, when sought in a proceeding after the dissolution of the marriage relation." This, however, as a ground for her right of action is hardly maintainable, if the coverture being still existent she could be barred from her action.

This annotator well may conceive, that in the early days of the construction of these married women statutes, the courts may have been inclined against inclusion of right action for tort. But generally they were broad enough in their terms to embrace all actions and against all persons, and certainly they greatly overturned the common law theory of unity between husband and wife. Illogically, however, the courts stopped short in their application.

C.

CORRESPONDENCE.

CONCURRENT POWER OF STATES TO ENFORCE EIGHTEENTH AMENDMENT.

July 20, 1920.

To the Editor of the Central Law Journal:

The *Harvard Law Review*, for May, 1920, (33 H. L. R., page 968), in editorial note, discusses, "The Concurrent Power of Congress and the Several States to Enforce the Eighteenth Amendment," saying, "Three views are possible: (1) That Concurrent power means joint power." (2) That the power is given to each, the legislation of either Congress or the States being of equal force with the other. (3) That the power is in each but that the legislation of Congress, as the Supreme Law of the land, will supersede inconsistent State legislation."

Its conclusion is, "The third theory seems preferable," because "It will result in a Uniform Enforcement of the first section of the Amendment."

How can the legislation of Congress under the eighteenth amendment be classed as *Supreme*, when the second section of the amendment expressly confers upon the State *Co-ordinate Power* with Congress to enforce the amendment, and thereby makes such State laws, equally the Supreme law of the land, under article VI of the Constitution of the United States?

The mantle of said article VI envelopes the State and Congress equally.

By said second section of said eighteenth amendment, the United States and the individual state are made *par nabile fratrum*, as to section one of said amendment. One brother is not ranked superior to the other in said section.

The State law, enforcing amendment 18th, is under said Article VI, as well as the law of Congress, and, therefore, is equally *Supreme*.

Respectfully,

FREDERICK G. BRUMBERG.

Mobile, Ala., July 20, 1920.

HUMOR OF THE LAW.

"Hello, Brown! Wasn't it a fine day yesterday?"

"It seemed so. They fined me once for speeding and once because my lights were out."

Yeast: You know in olden times when they wished to punish a man they put him under the village pump and pumped water on him.

Crimsonbeak: Well, that's the way the prohibitionists want us to take our medicine now, isn't it?—*Yonkers Statesman.*

"A humorist died the other day."

"Did he leave an estate?"

"Only one joke, which he bequeathed to his son."

"Not much of an inheritance."

"But he explained in his will that if the joke were expanded into a musical comedy, made the theme of a chautauqua lecture and worked over from time to time and sold to the magazines, it would provide his heir with a comfortable income."

A returned soldier and his sweetheart called on a Judge to marry them. The Judge married them, and, apparently satisfied with his work, he said to Vic: "Salute the bride." For an instant the groom was flustrated. Then he took two steps to the rear, came to a distinct halt, clicked his heels together and gave Mrs. Vic one of the "doughboys' finest." "Oh, well, I guess that will have to do," sighed the Judge as he signed the license.—*Argonaut.*

WEEKLY DIGEST.

Weekly Digest of Important Opinions of the State Courts of Last Resort and of the Federal Courts.

Copy of Opinion in any case referred to in this digest may be procured by sending 25 cents to us or to the West Pub. Co., St. Paul, Minn.

1. **Adverse Possession**—Parol Gift.—One entering upon land under an unconditional parol gift holds adversely from that time, and 15 years' possession will vest him with title.—Layne v. Norman, Ky., 221 S. W. 869.

2. **Assault and Battery** — Participant.—The fact that persons other than defendants participated in the assault upon plaintiff, and that some of his injuries were received at their hands, does not absolve the defendants from liability for all the injuries inflicted upon him in the course of an affray in which they and such other persons jointly participated.—Wrabek v. Suchomel, et al., Minn., 177 N. W. 764.

3. **Assignments**—Check.—A check does not operate as an assignment of any part of the fund to the credit of the drawer, and a bank is not liable to the holder of a check unless and until it accepts or certifies it.—People v. Munday, Ill., 127 N. E. 364.

4. **Attachment**—Ground of. — Where an attachment is sued out and reliance is had upon two or more distinct grounds for support thereof, they should be joined in the conjunctive; but where only one ground of attachment is relied upon, and two or more phases of the same fact which constitutes such ground are stated, the joinings of such different phases in the disjunctive will not invalidate the attachment affidavit.—Hatfield v. Blount, W. Va., 103 S. E. 203.

5. **Bailment**—Special Contract.—The parties to a bailment may diminish the liability of the bailee by special contract, and the bailee may impose whatever terms he chooses, if notice thereof be given to the bailor, and he understands and assents to them, provided the contract is not in violation of law or of public policy, and does not undertake to exempt the bailee from the consequence of his own fraud or negligence.—Gesford v. Star Van and Storage Co., Neb., 177 N. W. 794.

6. **Bankruptcy**—Homestead.—Where a bankrupt, contrary to his previous practice, in order to accumulate the sum of $13,000, which he placed in a homestead, discontinued his usual custom of making deposits in bank from day to day, and ceased to make further payments on his trade obligations, but retained proceeds of merchandise sold or of bills receivable, and purchased the homestead with nonexempt assets so realized on, and moved his family into the property with intent to defraud his creditors, the homestead exemption must be denied.—Kangas v. Robie, U. S. C. C. A.,2 64 Fed. 92.

7.——Jurisdiction.—The federal court has no jurisdiction, under Bankruptcy Act, § 23 (Comp. St. § 9607), in the absence of diversity of parties, over a suit by trustee in bankruptcy to invalidate a transfer to bankrupt's wife, made by his mother, on the ground of mental incapacity to transfer.—Kaigler v. Gibson, et al., U. S. D. C. 264 Fed. 240.

8.——Partnership.—Where neither a partner nor the partnership were parties to a bankruptcy proceeding in which another partner was adjudicated a bankrupt, the adjudication in bankruptcy did not draw into the proceedings the assets of the partnership, in view of Bankr. Act. § 5g (U. S. Comp. St. § 9589).—H. C. Denny & Co. v. Lee, Tex., 221 S. W. 947.

9.——Trover.—In an action of trover, the issue is one of title, and not debt, so that neither the defendant in such an action, wherein bail is required, nor the surety on his bond, can set up as a defense the discharge of the defendant in bankruptcy pending the action; and this is true, though plaintiff elects to take a money verdict for damages.—Watts v. Wight Investment Co., Ga., 103 S. E. 184.

10.——Truste's Title.—A trustee in bankruptcy takes the property of the bankrupt, not as an innnocent purchaser, but as the debtor had it at the time of the petition, subject to all valid claims, liens, and equities.—Boise v. Talcott, et al., U. S. C. C. A., 264 Fed. 61.

11.——Unpaid Stock.—The right of set-off, conferred on bankrupt's debtor by federal Bankruptcy Act July 1, 1898, § 68 (Comp. St. § 9652), does not apply to the creditor of a bankrupt corporation, who is also a stockholder and indebted to the corporation on an unpaid stock subscription.—Cochran v. Monteith, Tex., 221 S. W. 1055.

12. **Banks and Banking**—Certificate of Deposit.—A certificate of deposit, executed by a bank, is in legal effect a duebill, and imports personal liability of the maker. — First Nat. Bank of Rome, Ga., v. First Nat. Bank of Jasper, Fla., U. S. C. C. A., 264 Fed. 84.

13.——Right to Apply Deposits.—A bank has a right to apply money in its hands belonging

to an insolvent debtor to the obligations due by him to the bank.—Osceola Mercantile Co. v. Nabors, et al., Tex., 221 S. W. 991.

14. **Brokers**—Fidelity to Principal.—Loyalty to his trust is the first and absolutely indispensable duty that the agent owes his principal, so a broker must not put himself in such relation that his own interests or the interests of those he represents become antagonistic to those of his principal.—Hume v. Baggett & Baggett, Tex., 221 S. W. 1002.

15. **Carriers of Live Stock.**—Suitable Cars. —A railroad company, when engaged in the business of transporting live stock, is bound to furnish suitable cars therefor upon reasonable notice, whenever it is within its power to do so without jeopardizing its other business. Hines, Director Gen. of Railroads v. Mason, Ark., 221 S. W. 861.

16. **Carriers of Passenger**—Gratuitous Passenger.—A connecting carrier is not subject to the liabilities of a common carrier, if its services are gratuitous.—Lesesne v. Atlantic Coast Line Ry. Co., et al., S. C., 103 S. E. 147.

17. **Chattel Mortgages**—Conditional Sale. — Where goods were sold under a conditional contract, declared by staute to be a mortgage, seller did not waive his lien by taking notes in evidence of the goods sold.—Moore-Hustead Co., et al., v. Joseph W. Moon Buggy Co., Tex., 221 S. W. 1032.

18. **Conspiracy**—Conspirators. — Each conspirator is answerable for the acts of each and all of his coconspirators if the acts be in furtherance of the conspiracy, or the matter direct and proximate result of such conspiracy.—De Bardeleben v. Sellers, Ala., 84 So. 403.

19. **Constitutional Law**—Lawful Business.— To justify the state in interfering with the conduct of a lawful business, it must appear that the interests of the public generally, as distinguished from those of a particular class, require such interference, and that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals.—State v. Porter, Conn., 110 Atl. 59.

20.——Nullifying Contracts.—There is nothing in the federal Constitution prohibiting Congress or a state from nullifying existing contracts, if in the opinion of the legislative department, based on substantial grounds, they are injurious to the public.—United States v. United Shoe Machinery Co., U. S. D. C., 264 Fed. 138.

21. **Contracts** — Consideration. — An agreement by one to do what he is already legally bound to do is not a good consideration for a promise made to him.—Cole v. George, W. Va., 103 S. E. 201.

22.——Inconsistent Clauses.—Where there are inconsistent provisions in a contract, the one requiring something to be done may be given greater consideration than the other, which defeats a full performance.—Kennon v. Shepard, Mass., 127 N. E. 426.

23.——Several Considerations.—While a promise on several considerations, one of which is unlawful is void, where one for a legal and valuable consideration agrees to perform two acts which are severable, one of which is lawful and the other unlawful, the contract may be enforced as to that for which it was lawful to contract and held void as to the other.—Wicks, et al., v. Comves, et al., Texas, 221 S. W. 938.

24.——Stifling Competition.—Agreement not to bid at public sales, with the design to stifle competition and thereby purchase property for less than its fair value, are against public policy and void; but persons may unite in such numbers as to make the purchase advantageous to themselves, though competition is thereby lessened, provided this junction of interests be without unfair motives or injurious consequences.—Taylor, et al., v. Lafevers, Tex., 221 S. W. 957.

25.——Superseding.—An existing contract is superseded and discharged whenever the parties subsequently enter upon a valid and inconsistent agreement, completely covering the subject-matter which was embraced by the original contract.—Hewlett v. Almand, et al., Ga., 103 S. E. 173.

26.——Waiver.—Strict performance of a contract may be waived, and is waived where no objection is made.—Morrison v. Walker, N. C., 103 S. E. 139.

27. **Corporations**—Capital Stock. — A capital stock, and much less one distributed into shares of a nominal value, is not an essential feature of a business corporation.—State ex rel Standard Tank Car Co. v. Sullivan, Secretary of State, Mo., 221 S. W. 728.

28.——Income Tax.—Equity will not sanction a proceeding whereby a corporation leases its property to a foreign corporation for the purpose of avoiding payment of federal income taxes; such a proceeding being against public policy.—Allen v. Francisco Sugar Co., et al., N. J., 110 Atl. 37.

29.——Stockholder Liability.—Under Civ. Code S. D. § 441, providing that each stockholder of a corporation shall be individually liable "for the debts of the corporation to the extent of the amount that is unpaid upon stock held by him," the test of a stockholder's liability for a claim against the corporation is the nature or character of the original obligation, and a claim for damages sounding in tort is not converted into a "debt," within the meaning of the statute by recovery of a judgment thereon against the corporation. — Clinton Mining & Mineral Co. v. Beacon, U. S. D. C., 264 Fed. 228.

30. **Criminal Law**—Accomplice. — In order to warrant a conviction of a felony upon the testimony of an accomplice, the corroborating circumstances must be such as would lead to the inference that the defendant is guilty, independently of the testimony of the accomplice.—Welborn v. State, Ga., 103 S. E. 193.

31.——Amending Judgment. — Where a defendant in a criminal case has been fined, and an appeal has been taken to the appellate court, the trial court cannot, after the adjournment of the term, amend the judgment nunc pro tunc so as to add a sentence at hard labor.—Ex Parte Courson, Ala., 84 S. 411.

32.——Corroborating of Accomplice.—One accused of crime cannot be convicted upon the uncorroborated testimony of an accomplice nor upon his own confession; but the testimony of the accomplice is corroborated by the confession of the accused and upon such testimony and his confession he may be convicted.—State v Huebsch, Minn., 177 N. W. 779.

33.——Deaf Mute.—If deaf-mutes have sufficient understanding to comprehend facts about which they understake to speak, and appreciate the sanctity of an oath, they may

give evidence by signs, or through an interpreter, or in writing, and such testimony, through an interpreter, is not hearsay.—Bugg v. Town of Houlka, Miss., 84 So. 387.

34.——Falsus in teno.—Falsification of testimony by defendant gives rise to a presumption of guilt, to be weighed by the court.—Lindsey v. United States, U. S. C. C. A., 264 Fed. 95.

35. **Deeds**—Delivery.—Where grantee directs or agrees that deed may be left for him with a third party, delivery to the latter is equivalent to delivery to the grantee through an agent appointed for the purpose.—City Lumber Co., et al., v. Brown, et al., Cal., 189 Pac. 830.

36.——Mental Impairment.—Old age, eccentricity, or even partial impairment of mental faculties of grantor is not necessarily sufficient to authorize setting aside of his deed on the ground of want of mental capacity; but it is enough that he has sufficient mental capacity to comprehend the nature of the transaction and protect his own interests.—Bordner, et al., v. Kelso, et al., Ill., 127 N. E. 337.

37. **Divorce**—Alimony. — The law does not contemplate an award of alimony to a wife, who is not sick or disabled, sufficient to support her in absolute idleness.—Rogers v. Rogers, Mo., 221 S. W. 763.

38.——Custody of Child.—A decree of divorce awarding custody of children to a certain parent continues, so far as the custody of children is concerned, only until a further order of the court, and does not prevent the other party at any time from applying to the court and showing that the circumstances of the case are such that the best interests and welfare of the children require a change of custody.—Grant v. Grant, R. I., 110 Atl. 70.

39.——Jurisdiction.—A decree of divorce by a foreign state between parties domiciled in this state is absolutely void for lack of jurisdiction.—Hollingshead v. Hollingshead, N. J., 110 Atl. 19.

40. **Easements** — Additional Burden. — The owner of an easement cannot increase the burden upon the servient estates nor impose a new or additional burden thereon.—Dernier v. Rutland Ry. Light & Power Co., Vermont, 110 Atl. 4.

41.——Implied Reservation.—A reservation of light and air for the use of buildings will not be implied from the reservation of a private alley, but must ordinarily be expressed.—Gulick, et al., v. Hamilton, Ill., 127 N. E. 383.

42.——Severance of Estate.—When an estate is severed by partition without specific reference to easements for rights of way to serve the partitioned lands, easements by implication only arise when they necessarily must do so to give the allottees fair and reasonable enjoyment of their several allotments.—Ferguson v. Ferguson, Kan., 189 Pac. 925.

43.—**Estoppel**—Cause of Action. — Estoppel does not in itself give a cause of action, its purpose being to preserve rights already acquired and not to create new ones.—Berry v Massachusetts Bonding & Ins. Co., Mo., 221 S. W. 748.

44.——Partition. — Partition deed between widow and children of a deceased, reciting deceased's ownership of lands thereby partitioned, as well as a later contract between the parties based thereon, was binding on all the heirs, and estopped certain of them to claim, after the widow's death, larger interests in the land partitioned, on the ground that an interest in part of such land was never conveyed to deceased by his wife, who inherited it from her father.—Waltons Adm'r, et al., v. Rogers, et al., Ky., 221 S. W. 876.

45. **Evidence**—Suicide.—There is a presumption against suicide, and such presumption arises even when it is shown by proof that death is self-inflicted, as it is presumed to be accidental until the contrary is made to appear.—Eminent Household of Columbian Woodmen v. Matlack, Ark., 221 S. W. 858.

46. **Executors and Administrators**—Distribution.—The right of an administrator to retain from a share due a distributee the amount by which distributee is indebted to the estate exists whether the funds to be distributed were originally personalty or arose from a sale of the real estate.—Traders' Bank v. Dennis' Estate, Mo., 221 S. W. 796.

47.——Independent Executor.—An independent executor has the right to sell property to pay debts without an order, whether such power is expressed in the will or not.—Fernandez v. Holland-Texas Hypoteek Bank of Amsterdam, Holland, Tex., 221 S. W. 1004.

48. **Fraud**—Representations of Existing Facts. —As a general rule, representations on which fraud may be predicated must be of existing facts, or facts which previously existed, and cannot consist of mere expressions or conjectures as to future acts or events, though subsequently unfulfilled.—Beeman v. Richardson, et al., Cal., 189 Pac. 790.

49. **Frauds, Statute of**—Performance Within Year.—A contract establishing the relation of landlord and tenant for one year, though made before the year begins, may be in parol.—Render v. Harris, Ga., 103 S. E. 179.

50. **Fraudulent Conveyances**—Preference.—A debtor may prefer a creditor or creditors, notwithstanding the claims of other creditors, provided the debt preferred is actual and the property transferred does not greatly exceed the amount of the claim, and the transaction is not a mere device to secure an advantage to the debtor, or to hinder, delay, or defraud other creditors.—Bartel v. Zimmerman, et al., Ill., 127 N. E. 373.

51. **Homicide**—Escape from Injury.—A party is not justified in taking the life of another unless he is entirely free from fault in provoking or bringing on the difficulty, and there is no reasonable mode of escape open to him without increasing his danger.—Collins v. State, Ala., 84 So. 417.

52. **Husband and Wife**—Community Property. —Property purchased by the wife during the existence of the marriage is presumed to belong to the community, and actually does so belong unless paid for by her with her separate funds.—Garlick v. Dalbey, La., 84 So. 441.

53.——Estoppel.—The fact that wife omitted to enforce a clear right as to some of her funds, allowing her husband to use them for his own benefit, will not preclude her from enforcing her rights as to other funds, for a party's failure to enforce some rights will not estop him from enforcing right to other property.—Houston Natl. Bk. of Dothan v. Eldridge, Ala., 84 So. 430.

54.——Estoppel. — Where a wife acquired a business and permitted her husband to manage it for her, but the husband subsequently incorporated with her knowledge and took stock in his own name, the company acquired clear title to all property of wife's business conveyed in return for stock; wife being estopped to set up claim against it.—Glover v. Waltham Laundry Co., et al., Mass., 127 N. E. 420.

55. **Insurance** — Agency. — Where insurance agent, upon execution to agent by farmer of note for hail insurance, agreed to promptly forward the farmer's application to the insurance company and cause a policy to be issued by certain date the agent in making such agreement acted in his individual capacity, and not as agent for the company, and upon breach of such agreement by failure to forward application agent personally, and not the company, was liable for damages.—Mayhew v. Glazier, et al., Col., 189 Pac. 843.

56.——Fire Insurance.—A fire insurance policy payable to the estate of the deceased former owner of the property is valid.—Todd v. Security Ins. Co. of New Haven, Conn., Mo., 221 S. W 808.

57.——Practical Construction.—If there is a doubt as to the meaning of a contract of insurance, it is to be construed in the sense in which the insurer believed, at the time of making it, that the assured understood it.—Kelley v. Great Western Acc. Ins. Co., Cal., 189 Pac. 785.

58.——Proximate Cause.—Where explosion occurred during and after commencement of fire, the fire was the direct and proximate cause of the loss, and the explosion merely the result of and an incident of the fire.—Rosini v. Security Mut. Fire Ins. Co. of Chatfield, Minn., Cal., 189 Pac. 810.

59. **Infants** — Rescission. — An infant may rescind his contract, notwithstanding that his father was present advising and approving the transaction, since, although the father is entitled to the earnings of his minor child, he cannot bind him to contracts made in his behalf, nor sell, pledge, or transfer his property; his relation as natural guardian affecting only his right to the custody of the person.—Bombardier v. Goodrich., Vt., 110 Atl. 11.

60. **Libel and Slander**—Mitigation of Damage. —In an action for slander, mitigation only goes to the amount of punitive damages, and mitigating circumstances are not a defense to actual damages.—Foster v. Aubuchon, Mo., 221 S. W. 741.

61. **Life Estates**—Remainderman.—A life tenant's acquiescence in a boundary did not bar the remainderman during the existence of the life estate.—Dougherty v. Manning, et al., Tex., 221 S. W. 983.

62. **Limitation of Actions** — Amendment. — Though, when an individual is sued in personal capacity, complaint may be amended to make suit stand against him in his representative capacity as receiver, amendment cannot have relation to commencement of suit to avoid bar of limitations if statute would operate as bar to new suit commenced at time of amendment.—Cochrane, et al., v. Fuller, Ala., 84 So. 400.

63. **Malicious Prosecution**—Abuse of Process. —"Malicious use of legal process" is where a plaintiff in a civil proceeding employs the court's process in order to execute the object which the law intends for such a process to subserve, but proceeds maliciously and without probable cause.—Scarborough v. J. W. Goldsmith, Jr.-Grant Co., Ga., 103 S. E. 192.

64. **Marriage**—Voidable Contract. — An unconsummated marriage, which is infected with fraud of any kind whatsoever, which would render a contract voidable, is voidable at the option of the injured party, if promptly disaffirmed before any change of status has occurred.—Ysern v. Horter, N. J., 110 Atl. 31.

65. **Nuisance** — Abatement.—Though equity has jurisdiction to abate a public nuisance, the power should be exercised only where there is imminent danger of irreparable mischief before the tardiness of the law could reach it.—State ex rel. Tibbels, Pros. Atty. v. Iden, Mo., 821 S. W. 781.

66.——Injury to Family.—In action for damages for creation of a nuisance by means of noxious gases and fumes, plaintiff who owned land in the vicinity may, as part of his damage, recover for injury to the health not only of himself, but his wife, and different members of his family.—Steel Cities Chemical Co. v. Jenkins, Ala., 84 So. 408.

67. **Partnership**—Individual Liability.—Partners are individually responsible for torts by a firm when acting within the general scope of its business, whether they personally participate therein or not.—Sabinal Nat. Bk. v. Bryant, et al., Tex., 221 S. W. 940.

68. **Principal and Agent**—Waiver.—Generally an agent may waive a strict compliance of the terms of a contract in respect to those matters in which he is acting for the principal, provided the other party has no knowledge of any limitation of his power in such matter.—Brotherhood of Railroad Trainmen v. Cook, Tex., 221 S. W. 1049.

69. **Principal and Surety**—Release of Surety. —Mere satisfaction of judgment, to the extent of a payment on account thereof, is not a release of the surety of the judgment debtor. —Jarvis, et al., v. Frey, et al., Cal., 189 Pac. 795.

70. **Reformation of Instruments**—Equity.—Reformation of contracts is not confined to cases of fraud, and mistake or misprision of the scrivener is sufficient to call for an exercise of the power of equity.—Brunswig v. Bush, Mo., 221 S. W. 759.

71. **Release**—Mental Incapacity. — Where the release is void because of mental incapacity, a payment or tender back of the consideration is not a condition precedent to maintaining suit. —Edwards v. Morehouse Stave Mfg. Co., Mo., 221 S. W. 744.

72. **Sales**—Executory Contract.—Though ordinarily a contract does not become a sale if any term in which the seller must co-operate or which imposes liability or duty on him remains to be performed, an executory contract to sell and deliver a completed article may be changed or modified so as to pass title to the article before the manufacture is completed.—R F. Durrah Lumber Co. v. McGowin Lumber Co., Ala., 84 So. 421.

73.——Mutual Promises.—The promise of defendant to sell and deliver to plaintiff a lighting plant, and plaintiff's agreement to accept and pay for it on delivery, was not without consideration, as each promise was a sufficient consideration for the other, and no payment was required to make it obligatory.—Grunder v. Yeager, Kan., 189 Pac. 922.

74.——Rescission.—Where a seller of a bottled beverage warranted that it would not cloud within one year, but within less than that time it became clouded and unmerchantable, the buyer's right to rescind could not be denied on the ground that he could not place the seller in status quo because the beverage had deteriorated.—Bagnall v. Frank Fehr Brewing Co., et al., Mo., 221 S. W. 793.

75.——Set-Off.—In assumpsit for goods sold, a claim of defendants for expenses is improper, as such matters should be presented as a set-off.—Acha Hermanos y Cia v. Rosen Grant, Ala., 84 So. 399.

76. **Street Railroads** — Reciprocal Rights. — The rights of the public and the street cars in the use of the street are equal and reciprocal. Each in the exercise of his rights must exercise ordinary care for his own safety and the safety of others.—Lucas v. Omaha v. Council Bluffs St. Ry. Co., Neb., 177 N. W. 787.

77. **Trusts**—Notice of.—Purchasers of land from a trustee with knowledge of the trust take the property subject thereto, and both the cestui que trust and the trustee may recover the property.—Hughes, et al., v. Hughes, et al., Tex., 221 S. W. 970.

78. **Vendor and Purchaser** — Offer of Performance.—Offer of performance after rescission by the other party is unavailing. Rescission annihilates the contract.—Brown, et al., v. California and Western Land Co., Minn., 177 N. W. 774.

79. **Wills**—Attestation.—Failure of the attesting witnesses to a will to state in the attestation clause that testatrix subscribed her name in their presence is not fatal to the validity of the will, and competent evidence may be introduced on the probate of the will to show the will was executed and attested as required by law, and subscribed by testatrix in the presence of such witnesses.—In re Me-Hun-Kah's estate, Okla., 189 Pac. 867.

80.——Form of.—It is not necessary that any particular form of words be used to make a will; and, where an instrument is written in the testatrix's own hand, which mentioned all of her children and disposed of her property recognizing her children, such instrument must be deemed a will, and as such entitled to probate.—Wilson, et al., v. Wilson, et al., Ky., 221 S. W. 874.

81.——Nuncupative Will.—An expressed desire by testator to make a new written will, disposing of his property in a manner different from that in his valid existing will, though expressed in the presence of dependable witnesses, is not a nuncupative will.—In re Glebus Estate, Pa., 110 Atl 80.

82.——Specific Legacy.—A gift is specific when there is a bequest of a particular thing specified and distinguished from all others of the same kind which would immediately vest with the assent of the executor, and such gift can be satisfied by delivering only the particular thing specified.—In re Woods Estate, Pa., 110 Atl. 90.

83.——**Suicide**.—The fact that a testator committed suicide is not alone proof that he was insane.—In re Little's Estate, Cal., 189 Pac. 818.